

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE SECRETARY

In the Matter of)
)
Union Electric Company (AmerenUE))
)
) Docket No. 52-037
)
(Callaway County, Missouri)
Unit 2))
_____)

**PETITION TO INTERVENE AND REQUEST FOR HEARING
BY MISSOURIANS AGAINST HIGHER UTILITY RATES**

This is a petition to intervene filed under 10 C.F.R. § 2.309 and in response to a notice published by the Nuclear Regulatory Commission ("NRC" or "Commission") at 74 Fed.Reg. 6064 on February 4, 2009.¹ Missourians Against Higher Utility Rates ("MAHUR" or "Petitioner") hereby petitions to intervene in the application by AmerenUE ("AmerenUE" or "Applicant") before the Commission for a combined construction and operating license ("COL") for a new nuclear power reactor unit identified as Callaway Unit 2 ("Callaway 2"), located in Callaway County, Missouri. Petitioner also requests a hearing on the above captioned matter. As demonstrated below, Petitioner has standing to make this request. Petitioner is represented in this matter by the law firm of Brownstein Hyatt Farber Schreck, LLP.

The petition includes the details (with particularity) of the contention that MAHUR believes to be substantive and vital to NRC's consideration of AmerenUE's COL application ("COLA"): AmerenUE cannot make the required demonstration of reasonable assurance of

¹ The application, submittal documents and reference documents are available at: <http://www.nrc.gov/reactors/new-reactors/col/callaway.html>.

obtaining funds necessary to cover its estimated construction costs and related fuel cycle costs. Indeed, the entire foundation of AmerenUE's ability to fund the project is prohibited by Missouri law; and this situation has serious consequences appropriate for the Commission's consideration. For the reasons set forth below, MAHUR's contention should be admitted, and a hearing should be granted on this matter.

DESCRIPTION OF THE PROCEEDING

The COLA for the proposed Callaway 2 was filed by AmerenUE pursuant to 10 C.F.R. Part 52 Subpart C on July 24, 2008. Supplemental information and revisions were subsequently submitted on September 10 and 24, 2008, October 14, 2008, and November 14 and 25, 2008. In addition to a request for a Class 103 combined license to construct and operate a U.S. EPR nuclear power plant unit, the application also requests the necessary licenses under 10 CFR 30, 10 CFR 40 and 10 CFR 70 to receive, possess, and use byproduct, source and special nuclear material, respectively. On December 12, 2008 NRC accepted the COLA for docketing. NRC published a notice of hearing and opportunity to petition to intervene at 74 Fed.Reg. 6064 on February 4, 2009. The COLA incorporates by reference the application for a Standard Design Certification for the US EPR that was submitted to the NRC by AREVA NP on December 11, 2007.² The COLA is based upon and linked to the COLA application for UniStar's Calvert Cliffs Nuclear Power Plant Unit 3.³

MAHUR seeks party status in this licensing action because its members will suffer harm if the concerns identified in this petition are not addressed.

² AmerenUE - Callaway Plant Unit 2 COL application transmittal letter, page 2, July 24, 2008.

³ AmerenUE - Callaway Plant Unit 2 COL application transmittal letter, page 2, July 24, 2008.

STANDING OF PETITIONER

Missourians Against Higher Utility Rates

Missourians Against Higher Utility Rates (“MAHUR”) is a citizens group that was formed to monitor and, as necessary, oppose the efforts of AmerenUE to license and construct the Callaway 2 nuclear power station. MAHUR was established to provide an information and networking center for individuals concerned about nuclear energy and its costs, both in terms of its financial impact on ratepayers as well as its toll on human health and the environment. As discussed below, AmerenUE's cost and financing estimates are based entirely upon recovering all construction costs through CWIP, or "construction work in progress," rate adjustments, thereby allowing such costs to be funded by utility ratepayers. CWIP transfer to AmerenUE ratepayers is currently prohibited by Missouri law, Section 393.135 RSMo. While AmerenUE is seeking to obtain enactment of new legislation in the State of Missouri to overturn that prohibition, any exemption from or removal of the current prohibition for Callaway Unit 2 is fiercely resisted by a range of interests across the state; and a referendum initiative has already begun to present the issue to Missouri voters in 2010 if the statutory prohibition is removed by the Missouri legislature.

MAHUR believes, and is prepared to demonstrate to the Commission, that without passage of a new law authorizing rate-based CWIP recovery, AmerenUE does not have the financial capability to responsibly construct and operate the Callaway Unit 2 nuclear power station. This financial failure will result in methods and processes of operation that endanger human health and the environment.

MAHUR is representing the interests of its members, and specifically, Nicole Brown and Eric Brooks, who live within 50 miles of the proposed Callaway 2 reactor site. MAHUR's members live, work, travel, recreate and enjoy the natural resources in the vicinity of the proposed Callaway 2 facility. All are customers of AmerenUE, which provides electric power; and all will be directly impacted by AmerenUE's actions. If an accident occurred at the facility as a result of financial shortfalls or cost-cutting measures by AmerenUE, it could trigger radiological releases and environmental contamination that would adversely affect the health and well-being of MAHUR members and all people living in the region. The risks associated with this facility are unacceptable to MAHUR and its members; and MAHUR seeks to avoid or minimize the risks posed by the Callaway 2 facility by ensuring that the highest possible safety and environmental standards are imposed on AmerenUE. These issues should be fully and thoroughly addressed in the NRC licensing proceedings for this proposed facility.

The declarations of Eric Brooks and Nicole Brown are attached to and presented in support of this petition.⁴ There are viable alternatives to meet the energy needs of Missouri that will not cause irreversible damage to the local environment and pose unacceptable risk to the health and safety of the citizens of Missouri and MAHUR's members. The NRC should reject AmerenUE's Application because it does not present such an alternative.

Criteria for Intervention

To intervene as of right in an NRC licensing proceeding, a petitioner must demonstrate legal standing. Pursuant to 10 C.F.R. § 2.309(d), the petitioner must state: (1) the name, address and telephone number of petitioner; (2) the nature of petitioner's right under the Atomic Energy

⁴ See Exhibit 1, Nicole Brown Declaration; and Exhibit 2, Eric Brooks Declaration.

Act ("AEA") to be made a party to the proceeding; (3) the nature and extent of the petitioner's property, financial or other interest in the proceeding; and (4) the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest.

To determine whether a petitioner's "interest" provides a sufficient basis for intervention, the Commission relies on judicial concepts of standing. To demonstrate standing in NRC licensing proceedings under section 189a of the Act, a petitioner must allege: (1) a particularized injury; (2) that is fairly traceable to the challenged action; and (3) is likely to be redressed by a favorable decision. In addition, the Commission requires that the petitioner's interest fall "within the 'zone of interests' protected or regulated by the governing statute at interest." In short, the petitioner must establish that the injury he complains of falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for his complaint. Thus, the required elements for legal standing require a showing of: (1) (actual or imminent) injury-in-fact; (2) causation; (3) redressability; and (4) petitioner's interest being within the zone of interests of the governing statute(s).

The Commission has held that petitioners who reside within 50 miles of a proposed nuclear power plant are presumed to have standing in reactor construction permit and licensing cases, because there is an "obvious potential for offsite consequences" within that distance. See Diablo Canyon, (Pacific Gas & Electric Co. [Diablo Canyon Power Plant Independent Spent Fuel Storage Installation], LBP-02-23, 56 NRC 413, 426 (2002)); Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 148 (2001)). Thus, the proximity presumption establishes standing without the need to establish the elements of injury, causation or redressability. Turkey Point, LBP-01-6, 53 NRC at 150. Because the

COLA in this case is an application for a construction permit combined with an operating license, the proximity presumption should be applied to the COL proceedings.

An organization that wishes to intervene in a proceeding may do so either in its own right, by demonstrating harm to its organizational interests, or in a representational capacity by demonstrating harm to its members. See Hydro Resources, Inc., LBP-98-9, 47 NRC 261, 271 (1998). To intervene in a representational capacity, an organization must show not only that at least one of its members would fulfill the standing requirements, but also that he or she has authorized the organization to represent his or her interests. See Private Fuel Storage, LLC, (Independent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 168, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998).

MAHUR and Members Have Standing to Participate

Standing to participate in this proceeding is demonstrated by the attached Declarations of Nicole Brown and Eric Brooks, who live within 50 miles of the proposed Callaway 2 facility. Ms. Brown and Mr. Brooks have authorized MAHUR to represent their interests in this proceeding. Ms. Brown's Declaration states that she lives within 50 miles of the proposed Callaway 2 facility and that she supports this petition. Mr. Brook's Declaration states that he lives within 50 miles of the proposed Callaway 2 facility and that he supports this petition. Thus, both Nicole Brown and Eric Brooks have presumptive standing in this intervention petition.

Nicole Brown seeks to protect her life, health and safety and economic interests as a resident of Jefferson City, Missouri, and as a customer and ratepayer of AmerenUE, by opposing issuance of the COL. Nicole Brown seeks to ensure that no COL is issued by the Commission

unless AmerenUE demonstrates full compliance with the Atomic Energy Act, the National Environmental Policy Act, and all other applicable laws and regulations.

Eric Brooks seeks to protect his life, health and safety and economic interests as a resident of Jefferson City, Missouri, and as a customer and ratepayer of AmerenUE, by opposing issuance of the COL. Eric Brooks seeks to ensure that no COL is issued by the Commission unless AmerenUE demonstrates full compliance with the Atomic Energy Act, the National Environmental Policy Act, and all other applicable laws and regulations.

Although not necessary because of their presumed standing (based on geographical proximity to the proposed facility), standing of Ms. Brown and Mr. Brooks to intervene is also supported based on the requirements of (1) injury; (2) causation; (3) redressability; and (4) zone of interest. Petitioners hereby request to be made parties to the proceeding because: (1) construction and operation of the Callaway 2 nuclear power station represents a tangible and particular harm to the health and well-being of Ms. Brown and Mr. Brooks, who live within 50 miles of the site and who are ratepayers of the company; (2) the Commission has initiated proceedings for a COL, the granting of which will directly affect Ms. Brown and Mr. Brooks; and (3) the Commission is the sole agency with the power to approve, deny or modify a license to construct and operate the Callaway 2 nuclear power plant.

LEGAL STANDARD

A contention is admissible if it establishes a genuine dispute with the applicant on a material issue of fact or law, and raises an issue within the scope of the proceeding. 10 CFR § 2.309(f). In order to demonstrate a factual dispute a petitioner must make "minimal showing that

material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate." 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989).

Here, MAHUR presents a factual dispute as to whether AmerenUE possesses or has reasonable assurance of obtaining funds necessary to cover project costs. This dispute raises an issue within the scope of the proceeding and material to the findings the Commission must make, because it directly impacts the Applicant's ability to provide adequate assurances of public health and safety.

CONTENTION

The Applicant Does Not Meet the Financial Qualification Requirements of 10 CFR § 50.33.

Under 10 CFR § 50.33(f), AmerenUE is required to provide the following:

If the application is for a construction permit, the applicant shall submit information that demonstrates that the **applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction costs and related fuel cycle costs**. The applicant shall submit estimates of total construction costs of the facility and related fuel cycle costs, and shall indicate the source(s) of funds to cover these costs.

10 CFR § 50.33(f)(1) (emphasis added).⁵

AmerenUE has not met this criteria. The Applicant does not possess, and cannot demonstrate a reasonable assurance of obtaining, funds necessary to cover estimated construction costs and related fuel cycle costs.

AmerenUE's proposed funding of construction costs and initial core fuel supply costs rests entirely on rate-based recovery for CWIP, which would allow AmerenUE to finance the project by raising consumer rates now and during project construction. CWIP recovery through

⁵ As stated in the Application (1.2.2.2.3 at 1-13), because AmerenUE conducts business as regulated electric utility, it is exempt from an operational cost financial qualification review.

increased rates is prohibited by existing Missouri law (393.135 RSMo., hereinafter referred to as the "Anti-CWIP Law"). The Anti-CWIP law was made effective by a referendum passed in 1976 (by a 2-1 margin) and in response to an original proposal for construction of Callaway Unit 1 by the predecessor to AmerenUE.

In the COLA itself, AmerenUE admits that its funding of the project requires changing the presently existing laws of the State of Missouri:

The estimate assumes CWIP will be included in rate base in the State of Missouri. In November, 1976, a voter referendum, Proposition 1, was passed prohibiting CWIP in rate base. It is the position of AmerenUE that AmerenUE can effectively work with the Missouri legislature and the citizens of Missouri to exempt Callaway Plant Unit 2 and its associated facilities from this regulation. Should this effort be unsuccessful, the construction cost estimate would likely increase and AmerenUE would need to reevaluate its options.

Application 1.2.2.2.2 at 1-12.

Recent public admissions by AmerenUE executives also make clear that this provision of the Application significantly understates AmerenUE's requirements for a change in law to support its proposals. Without rate-based recovery of CWIP, AmerenUE will not merely be compelled to "re-evaluate its options" – it will be indisputably incapable of constructing or operating the project in accord with industry (and NRC) standards. There is no question that AmerenUE cannot fund the project from its own assets and reserves. Indeed, the estimated cost to build the plant is nearly as much as the stock market value of AmerenUE's parent company, Ameren Corp.⁶ And AmerenUE representatives have publicly admitted that obtaining outside financing is virtually impossible for the project at this time. In the words of AmerenUE Chief

⁶ Emily Coleman, *Regulators concerned Ameren bill could up commission's workload*, Columbia Missourian, January 24, 2009, attached as Exhibit 3.

Executive Thomas Voss, "[in the absence of CWIP] we just couldn't do it...The risk would be too great. We don't think people would lend us the money. We don't think our board of directors would approve it. And we don't think our stockholders would think it's prudent."⁷ In another interview, AmerenUE Senior Vice President Richard Mark flatly stated that without rate-based recovery of CWIP, AmerenUE would not build the project, because "[it would be] laughed off Wall Street."⁸ Mr. Voss repeated that position in testimony before a Missouri Senate committee, testifying that without recovery of CWIP, "we won't build [Callaway 2]."⁹

AmerenUE also vastly overstates its ability to "effectively work with the Missouri legislature and the citizens of Missouri to exempt Callaway Plant Unit 2 and its associated facilities from [the Anti-CWIP Law]." Application 1.2.2.2.2 at 1-12. A bill to exempt AmerenUE from the Anti-CWIP Law ("SB 228"),¹⁰ pushed by AmerenUE, is under consideration by the Missouri State Senate; and the Commerce, Consumer Protection, Energy and Environment committee just voted 6-4 to pass the bill on for debate before the full Senate.¹¹ Considering that the Anti-CWIP Law was approved by Missouri voters by a 2-1 margin, passage of SB 228 is by no means a certainty. In fact, a recent statewide survey of registered Missouri voters showed that 82% of voters oppose "allowing utility companies to charge consumers for

⁷ Jeffrey Tomich, *AmerenUE ponders state law as it looks to add a nuke plant*, St. Louis Post-Dispatch, June 9, 2008, attached as Exhibit 4.

⁸ Paul Davidson, *Nuclear power inches back into energy spotlight*, USA Today, March 29, 2009, attached as Exhibit 5.

⁹ Janese Heavin, *Voss: Ameren will walk away from Callaway II*, The Columbia Daily Tribune, February 11, 2009, attached as Exhibit 6.

¹⁰ The text of the proposed bill is available at http://www.senate.mo.gov/09info/BTS_Web/Bill.aspx?SessionType=R&BillID=597908.

¹¹ See id. for a list of legislative action taken on SB 228.

the cost of building new power plants before they are up and running."¹² The firm that conducted the poll concluded "rarely we have seen [sic] such overwhelming opposition to a policy proposal that is seriously being considered by a legislature."¹³ And various public interest groups, including many citizens who actively supported the Anti-CWIP Law, have vowed to challenge any effort to pass, or any passage of, SB 228.¹⁴

Put simply, AmerenUE has not provided an accurate representation of its ability to obtain necessary funding for the project in its Application – because the entire basis of AmerenUE's costs estimates, and its ability to fully and timely pay those costs, is flatly prohibited by existing Missouri law. AmerenUE cannot provide any assurance, let alone a reasonable assurance, of its ability to procure the funds necessary for responsible and safe construction and management oversight of fuel cycle costs and risks. Accordingly, AmerenUE cannot meet a key acceptance criteria of the Commission; and the Commission has previously granted intervention based specifically upon a proposed Intervenor's contention of inadequate showing of financial qualification under 10 CFR § 50.33. See, e.g., North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI 99-06, 49 N.R.C. 201 (1999). The Commission should find similarly here.

It is important to note here that the issue raised in this Petition is concerned with more than just the financial viability of the project. It follows that if AmerenUE is unable to fund the project as proposed, AmerenUE cannot demonstrate that it will have the funds necessary to ensure adequate public health and safety measures for this Project. AmerenUE's inability to

¹² Memorandum from Bennett, Petts, & Normington to the Fair Electricity Rate Action Fund dated March 23, 2009, attached as Exhibit 7.

¹³ Id.

¹⁴ See supra Jeffrey Tomich, *AmerenUE ponders state law as it looks to add a nuke plant*, St. Louis Post-Dispatch, June 9, 2008.

meet the required financial criteria will have serious consequences that merit further inquiry by the Commission at a hearing.

CONCLUSION

For the foregoing reasons, Petitioner requests that its petition to intervene and request for hearing be granted.

Respectfully submitted this 6th day of April, 2009.

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